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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

MARY ANN SUSSEX; MITCHELL PAE; ) Case No. 2:08-cv-00773-RLH-PAL  
MALCOLM NICHOLL and SANDY )  
SCALISE; ERNESTO VALDEZ, SR. and )  
ERNESTO VALDEZ, JR; JOHN )  
HANSON and ELIZABETH HANSON, )  
Plaintiffs, )  
v. )  
TURNBERRY /MGM GRAND TOWERS, )  
LLC, a Nevada LLC; MGM GRAND )  
CONDOMINIUMS LLC, a Nevada LLC; )  
THE SIGNATURE CONDOMINIUMS, )  
LLC, a Nevada LLC; MGM MIRAGE, a )  
Delaware Corporation; TURNBERRY/ )  
HARMON AVE., LLC, a Nevada LLC; )  
and TURNBERRY WEST REALTY, INC., )  
a Nevada Corporation, )  
Defendants. )  
OPPOSITION TO MOTION FOR  
ORDER REQUIRING AAA TO  
SUSTAIN OBJECTION TO  
APPOINTMENT OF  
ARBITRATOR (#68)

1           **I. INTRODUCTION**

2           The Court should deny plaintiffs' motion because there is no legal  
 3 basis for the Court to intervene and address plaintiffs' frivolous objections to the  
 4 appointment of arbitrator Brendan Hare. The AAA already dealt with and  
 5 properly decided this dispute. The plaintiffs are not entitled to a second opinion  
 6 from this Court because they cannot point to a single violation, much less one that  
 7 rendered the arbitrator selection process fundamentally unfair. The AAA:  
 8 (1) followed its arbitrator selection rules to the letter; (2) accommodated the  
 9 parties' agreement for comprehensive pre-screening for conflicts; (3) selected  
 10 various arbitrators who had the experience and qualifications requested by the  
 11 plaintiffs; (4) offered to expand the pool of arbitrators by including arbitrators  
 12 from outside its class action panel; and (5) repeatedly warned the plaintiffs of its  
 13 power under the rules to appoint an arbitrator if the parties failed to agree on one.

14 *See Declaration of Akke Levin ("Levin Decl."), Exhibits 1-2, 5, 7, 9- 10, and 13.*

15           The appointment of Arbitrator Hare has nothing to do with  
 16 misconduct of the AAA. It is the consequence of plaintiffs' refusal to accept  
 17 arbitrators from outside the AAA's class action panel, their unreasonable demands  
 18 for arbitrator qualifications, and their deliberate decision to strike six of the eight  
 19 proposed arbitrators on the last panel. In doing so, they rejected five highly  
 20 qualified and experienced arbitrators who matched *exactly* their requested criteria  
 21 and gambled on the "reserve" arbitrator they now wish to avoid. What violates the  
 22 AAA rules here is plaintiffs' request for a *third* panel of arbitrators and their  
 23 opportunistic request for an arbitrator they rejected on October 15, 2009, when  
 24 they denounced the panel on which she appeared as a "fraud and a sham." The  
 25 instant motion should be denied.

26           **II. FACTS**

27           The plaintiffs are parties to uniform hotel condominium purchase and  
 28 sale agreements ("PSAs"). Each PSA contains a clear, enforceable arbitration

1 Dispute Resolution Rules of the American Arbitration Association ("AAA") as  
 2 modified herein." PSA section 24.10, Ex. C to Motion to Compel Arbitration (# 17).  
 3 The AAA Commercial Arbitration Rules provide:

4 (a) If the parties have not appointed an arbitrator and have not  
 5 provided any other method of appointment, the arbitrator shall be  
 6 appointed in the following manner: The AAA shall send  
 7 simultaneously to each party to the dispute an identical list of 10  
*(unless the AAA decides that a different number is appropriate)* names of  
 persons chosen from the National Roster . . . .

8 (b) If the parties are unable to agree upon an arbitrator, each party to  
 9 the dispute shall have 15 days from the transmittal date in which to  
 10 strike names objected to, number the remaining names in order of  
 11 preference, and return the list to the AAA . . . . *If the parties fail to agree  
 on any of the persons named . . . the AAA shall have the power to make the  
 appointment from among other members of the National Roster without the  
 submission of additional lists.*

12 R-11 (emphasis added).

13 The AAA Supplementary Rules for Class Arbitrations specify that for  
 14 cases filed as putative class actions, like plaintiffs' arbitration demand, "at least one  
 15 of the arbitrators shall be appointed from the AAA's national roster of class  
 16 arbitration arbitrators." Section 2(a), Supplementary Rules for Class Arbitrations;  
 17 *see also id.* section 1(a).<sup>1</sup>

18 **A. The October 9, 2009, Selection List of Arbitrators.**

19 On October 9, 2009, according to the AAA rules cited above, the AAA  
 20 case administrator Jonathan Weed circulated a list of ten prospective arbitrators  
 21 from the national roster of class action arbitrators together with the arbitrators'  
 22 resumes. Levin Decl., ¶ 4, Ex. 2. The arbitrator list was accompanied by a letter in  
 23 which Mr. Weed urged the parties to agree on an arbitrator and, if they couldn't, to  
 24 "leave as many names on the list . . . ." *Id.* Mr. Weed warned that if the parties

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25 <sup>1</sup> Excerpts of the AAA Commercial Arbitration rules and AAA  
 26 Supplementary Rules for Class Arbitrations are attached as exhibit 1 to the  
 27 declaration of Akke Levin. They are also available online at  
<http://www.adr.org/sp.asp?id=22440> (AAA commercial arbitration rules) and  
<http://www.adr.org/sp.asp?id=21936> (AAA Supplementary Rules for Class  
 28 Arbitrations).

1 failed to agree, the AAA rules permitted the AAA to administratively appoint an  
 2 arbitrator in the parties' place. *Id.* Mr. Weed's letter also confirmed the subjects  
 3 discussed during a telephone conference with him that had taken place nine days  
 4 earlier, including the parties' preferences in terms of the prospective arbitrators'  
 5 qualifications and experience. *Id.* Mr. Weed confirmed the defendants' request for  
 6 arbitrators with transactional experience and the plaintiffs' request for arbitrators  
 7 with a "background in securities matters," preferably "former U.S. Attorneys or  
 8 Assistant U.S. Attorneys." *Id.*

9 The first two arbitrators on the list had precisely the qualifications  
 10 requested by the plaintiffs: William L. D. Barrett's resume reflected that 60% of his  
 11 practice consists of securities law matters; John W. Bissell is a former assistant U.S.  
 12 Attorney. *See id.* The other eight were equally qualified and experienced to  
 13 arbitrate the dispute, which centers on plaintiffs' allegations that the hotel  
 14 condominium units they purchased are unregistered securities.<sup>2</sup> For example,  
 15 Robert Brent had more than 20 years of experience with real estate litigation; John  
 16 Fleming had substantial experience with fraud litigations and had represented  
 17 consumers in cases involving deceptive trade practices. *Id.*

18       1.     *Plaintiffs' Request for an Entire New Panel and Pre-Screening*  
 19            *for Conflicts.*

20       On October 12, 2009, Robert Gerard, counsel for plaintiffs, wrote  
 21 Mr. Weed and defendants' counsel asking "that *an entire new panel* of AAA  
 22 National Class Action Arbitrators be submitted . . ." because he had identified  
 23 **one** proposed arbitrator whose firm "*may have* drafted the arbitration clause for  
 24 the Defendants in this matter." Levin Decl., Ex. 3 (emphasis added). Although  
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26       2 As the Court is aware, the plaintiffs have made claims under the Securities  
 27 Act of 1933, the Securities Exchange Act of 1934, and the Nevada Uniform  
 28 Securities Act. Amended Federal Class Action Complaint, # 14, at 1. They also  
 make a deceptive trade practices claim and a number of tort claims sounding in  
 fraud. *Id.*

1 neither Mr. Gerard nor his co-counsel, Norman Blumenthal, had asked for a  
 2 conflict screening during the September 30, 2009, administrative conference,  
 3 Mr. Gerard suggested that the ten arbitrators should have been pre-screened for  
 4 conflicts. *See id.* Mr. Gerard reiterated plaintiffs' request for arbitrator candidates  
 5 with "background experience as U.S. Attorneys and other Governmental civil  
 6 fraud and SEC prosecutions . . .," *id.* — ignoring the fact that William Barrett and  
 7 John Bissell had precisely that "background experience."

8       Three days later, Mr. Blumenthal called Mr. Weed, *ex parte*, to voice  
 9 his objections over the selection list. *Id.* Ex. 4 (confirming telephone conference in  
 10 an October 15, 2009, email). Like Mr. Gerard, Mr. Blumenthal asked for a new list  
 11 of arbitrators "after the AAA has conducted a conflicts check." *Id.* Based on a  
 12 *potential* conflict with *one* arbitrator — Snell & Wilmer attorney Michael  
 13 Zimmerman — Mr. Blumenthal objected to "*the entire list as inherently prejudicial*  
 14 *to Petitioners.*" *Id.* (emphasis added). Mr. Blumenthal then threatened the AAA  
 15 administrator that, unless the proposed arbitrators were pre-screened for  
 16 conflicts, the plaintiffs would:

17       continue to object to the entire selection process as a  
 18 *fraud and a sham orchestrated by AAA with full knowledge*  
 19 of the inherent conflict with at least one of the proposed  
 20 panelists whose firm turns out to be the drafter of the  
 21 contract underlying this transaction . . . . *The Petitioners*  
 22 *also object to the list as not having been prepared with an*  
 23 *attempt to satisfy Petitioners' request to include former US*  
 24 *Attorneys or District Attorneys as requested by the*  
 25 *Petitioners. . . .*

26       *Id.* (emphasis added).

27       The AAA case administrator did not ignore the plaintiffs' concerns.  
 28 He set up a telephone conference — now *with* the participation of defendants'  
 29 counsel. *See id.*, Ex. 5. Only then did plaintiffs' counsel agree that a "new" panel  
 30 could include some or all of the nine other proposed arbitrators. *Id.* The  
 31 defendants and Mr. Weed agreed to plaintiffs' request that all potential arbitrators  
 32 be pre-screened for conflicts. *Id.*

2. *Plaintiffs' Request for Case-Specific Information and Former Judges.*

Four days later, on October 19, 2009, Mr. Blumenthal "upped" the plaintiffs' demands again: in addition to pre-screening, he wanted the names and resumes of all the arbitrators on the AAA class action panel. *Id.*, Ex. 6. In addition, he requested:

(1) a summary of *how these persons were selected for the panel*, (2) how many class actions matters each panelist has acted in the capacity of a neutral, (3) *the disposition as to certification and judgment* as to each of these matters, (4) how much time over the last 24 months they have spent working as a neutral, and (5) how many class action matters the proposed neutral worked on prior to becoming a neutral and *the percentage of class action work that was plaintiff's work versus defendant's work*.

If a panelist is still with a firm in private practice as opposed to working full time as a neutral I think counsel should also be advised as to (1) the firm's representative clients and (2) the percentage of the firm's work that is plaintiff's work versus defendant's work and corporate work versus individual work.

*Id.* (emphasis added).

Mr. Blumenthal was also concerned "that there are not in fact ten (10) neutrals on the class action panel from which we can choose one (1) *and therefore the list is inherently prejudicial.*" *Id.* (emphasis added). Thus, Mr. Blumenthal had already made up his mind on October 19, 2009, that the second arbitrator list, which would not be circulated until January 2010, was unfair. *Id.*

On November 16, 2009, plaintiffs' counsel again called Mr. Weed — apparently to discuss Mr. Blumenthal's concern that the AAA may not be able to provide a list of ten arbitrators from the AAA class action panel that fit his criteria. *Id.* Ex. 7 (email dated November 17, 2009, 2:41 p.m. confirming this telephone conversation). Plaintiffs' counsel told Mr. Weed that they now agreed that "retired judges" could also be on the proposed arbitrator list, "in addition to securities

1 arbitrators." *Id.* Counsel for defendants was not invited to participate in this call.  
 2 *Id.*; *see also id.* ¶ 10 and Ex. 8 thereto.

3 ***3. AAA's Efforts to Meet Plaintiffs' Demands.***

4 The AAA case administrator once more made every effort to meet  
 5 plaintiffs' demands. He confirmed that the AAA "expects to provide a list of ten  
 6 names without conflicts for this matter." *Id.* Ex. 7. He agreed that the AAA  
 7 would: (1) do a "complete conflicts check" by sharing with proposed arbitrators the  
 8 parties' pleadings, the conflict checklists, and names of the parties and their  
 9 counsel, *including the "Snell and Wilmer law firm"*; (2) ask prospective arbitrators  
 10 detailed information about their experience as an arbitrator, "including a list of the  
 11 parties involved in each case . . . the nature of the awards . . . rendered in each  
 12 matter . . . [and] the attorneys who appeared before [the arbitrator] in each case";  
 13 and (3) "potentially" include in the new list any arbitrators who were on the first  
 14 list. *Id.* Ex. 9 (January 4, 2010 email).

15 Mr. Weed also told the parties that the AAA could "increase the pool  
 16 of arbitrators from which those ten will be drawn if the parties agree to consider  
 17 arbitrators who are not on the Association's Class Action Panel." *Id.* Ex. 7. He  
 18 repeated that suggestion during the December 31, 2009, telephone conference. *Id.*  
 19 ¶ 11. Although the defendants encouraged the inclusion of arbitrators from  
 20 outside the AAA's class action panel, the plaintiffs refused to accept the  
 21 proposition. *Id.*<sup>3</sup>

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22

23 <sup>3</sup> Mr. Weed's January 4, 2010 email inaccurately summarized the parties'  
 24 positions during the December 31, 2009, conference call by saying that the  
 25 "*Plaintiffs . . . would be interested in reviewing potential arbitrators who are not*  
 26 *on the Association's Class Action Panel . . .*" and that "*Respondent was not in*  
 27 *agreement with reviewing potential arbitrators who are not on the Class Action*  
 28 *Panel.*" *Id.* ¶ 12, Ex. 8 thereto (emphasis added). The opposite was true: the  
 plaintiffs insisted on arbitrators who were on the class action panel. *Id.* ¶ 11; *see also id.* Ex. 3 (Mr. Gerard's October 12, 2009 email) (requesting "National AAA  
 Class Action Arbitrators"). The defendants encouraged the inclusion of  
 arbitrators from outside the AAA class panel because, among other reasons, the  
 putative class action may never be certified as a class. *Id.* ¶ 11; *id.*, Ex. 8

## 1           B.     The January 29, 2010 Selection List of Arbitrators.

2           On January 29, 2010, Mr. Weed circulated a new list of eight  
 3 arbitrators all from the AAA's "national roster of class action arbitrators." *Id.* Ex.  
 4 10.<sup>4</sup> As requested by the plaintiffs, this list included two former judges — William  
 5 Dreier and George Pratt — one former U.S. attorney — David Love — and several  
 6 proposed arbitrators with securities law experience, including Ralph Halpern,  
 7 Ronald Longhofer, and George Pratt. *Id.* Four of the eight arbitrators — Brewer,  
 8 Dreier, Pratt and Fleming — had previously handled a number of class  
 9 arbitrations under the auspices of the AAA. *Id.* All eight prospective arbitrators  
 10 had commercial litigation experience, including experience with the type of claims  
 11 asserted by the plaintiffs — *i.e.*, securities fraud claims, deceptive trade practice  
 12 claims, and common law fraud claims. *Id.* All proposed arbitrators provided  
 13 disclosure forms; none had conflicts to report. *Id.* And although proposed  
 14 arbitrator Ralph Halpern declined to disclose any prior case information, he did so  
 15 due to "confidentiality restrictions," and still provided details on his prior  
 16 employment history and arbitrator experience. *Id.* Mr. Weed again urged the  
 17 parties to agree on an arbitrator, leave as many names on the list as possible, and  
 18 warned the parties that the AAA could appoint an arbitrator in their place if the  
 19 parties did not agree, "without the submission of an additional list." *Id.*

20           1.     *Plaintiffs' Objections to the Second List.*

21           As he had done with the first arbitrator selection list, Mr. Blumenthal  
 22 immediately objected to the "*entire process.*" *Id.* Ex. 11. Without consultation  
 23 whatsoever with defendants' counsel, and ignoring Mr. Halpern's ethical  
 24 obligations, Mr. Blumenthal directed Mr. Weed to "take out Mr. Halpern as he

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25  
 26 (November 17, 2009 email of Steve Morris) ("they are not . . . entitled to a panel  
 27 made up of class arbitrators").

28           <sup>4</sup> The Plaintiffs suggest that the list only included seven proposed  
 arbitrators. Memorandum of Points and Authorities, # 68, at 2, 5.

1 does not satisfy *our* agreement as to the rules of this arbitration for panel  
 2 selection." *Id.* (emphasis added). Discounting Mr. Halpern, Mr. Blumenthal  
 3 assailed the AAA for tendering "7 instead of 10" arbitrators, arguing that a "30%  
 4 reduction in the panel" was "*inherently prejudicial to consumers.*" *Id.* (emphasis  
 5 added).

6 In response to Mr. Blumenthal's email, the AAA case administrator  
 7 set up a telephone conference, which took place on Friday, February 5, 2010.  
 8 Levin Decl. ¶ 15. Mr. Weed explained that the eight arbitrators were the result of  
 9 AAA's efforts to gather available arbitrators from the class action panel who met  
 10 the requested qualifications *and* were conflict-free. *Id.* Mr. Weed also explained  
 11 that the AAA necessarily had to "hold back" one pre-screened, conflict-free  
 12 arbitrator in case the parties could not come to an agreement on any of the eight  
 13 proposed arbitrators. *Id.* Indeed, the AAA rules provide that:

14 If the "parties fail to agree on any of the persons named  
 15 . . . the AAA shall have the power to make the appointment  
 16 from among other members of the National Roster without the  
 17 submission of additional lists.

18 R-11(b) (emphasis added).

19 The plaintiffs reluctantly agreed to proceed with the selection and  
 20 submitted their selection list with their ranks and strikes on February 19, 2010.  
 21 Levin Decl. ¶ 16 and Ex. 12 thereto.

### 22 C. The AAA's Appointment of Brendan Hare

23 On Friday, February 26, 2010, Mr. Weed advised the parties that the  
 24 AAA had appointed arbitrator Brendan Hare. *Id.* Ex. 13. The appointment of  
 25 Mr. Hare meant that there was not one arbitrator on the second list on which the  
 26 parties agreed. As the defendants would find out later, the plaintiffs had struck all  
 27 but two of the eight proposed arbitrators. *See id.* ¶ 16 and Ex. 12 thereto. The  
 28 plaintiffs had rejected the two former judges (Pratt and Dreier), the arbitrator with  
 the most class arbitration experience (Brewer), and two arbitrators with securities

1 law experience (Halpern and Longhofer), even though the qualifications and  
 2 experience of these five arbitrators corresponded precisely to plaintiffs' requests  
 3 and preferences. *See id.* Exs. 2, 7.

4       **1. Plaintiffs' Objections to Mr. Hare's Appointment.**

5       That same morning — without copying defendants' counsel —  
 6 Mr. Blumenthal emailed Mr. Weed and objected to the "entire selection process as  
 7 being a *sham and a fraud.*" *Id.* Ex. 14 (emphasis added). Despite Mr. Weed's  
 8 explanation during the February 5, 2010 telephone conference that one arbitrator  
 9 was necessarily left off the second selection list in case the parties could not agree,  
 10 Mr. Blumenthal asked: "Why was Mr. Hare left off the original list?" *Id.* Ignoring  
 11 the fact that the AAA had included two former judges, one former U.S. attorney,  
 12 and several arbitrators experienced with "securities matters," *and* that he had  
 13 struck all but one of them, Mr. Blumenthal asked why was his clients' "request for  
 14 a neutral with former experience as a U.S. Attorney, Judge or SEC attorney  
 15 ignored?" *Id.* Mr. Blumenthal refused to proceed with Hare, and demanded that  
 16 Mr. Hare be deposed to determine if he is "in fact a neutral." *Id.* Mr. Blumenthal  
 17 then threatened: "If we find that he has never ruled in favor of a consumer in a  
 18 class claim and *thus* is a *handpicked stooge* for MGM *we will sue AAA.*" *Id.* (emphasis  
 19 added). He then threatened to have AAA "*cease and desist* acting as an *alleged*  
 20 neutral arbitration company. . . *as a result of this fraud. . .*" and seek discovery to  
 21 determine "*if this tilt in favor of corporations* in [sic] an ongoing practice of AAA and  
 22 a fraud on consumer claimants." *Id.* (Emphasis added).

23       **2. Plaintiffs' Formal Objection Letter to the AAA.**

24       On April 1, 2010, plaintiffs' counsel served a letter on the president,  
 25 vice-president, and case manager of the AAA, objecting to the appointment of  
 26 Mr. Hare and certain of Mr. Weed's alleged "acts of nonfeasance and malfeasance  
 27 . . ." *Id.* Ex. 15 thereto. Plaintiffs argued that: (1) the parties had an agreement to  
 28 be provided with a second list of ten proposed arbitrators; (2) four of the

1 arbitrators on the first list should have been included on the second list because  
 2 they passed conflict screening in a different case; and (3) Mr. Weed had  
 3 "unilaterally selected" Mr. Hare for their "billion dollar [consumer] case." *Id.*

4 The AAA invited the defendants to respond to plaintiffs' objections by  
 5 letter dated April 2, 2010. *Id.* ¶ 18, Ex. 16. The defendants submitted a response  
 6 letter on April 7, 2010. *Id.* Ex. 17 (exhibits thereto omitted). After considering  
 7 both letters and the parties' positions, and noting that it could not change the AAA  
 8 rules without the parties' agreement, the AAA confirmed the appointment of  
 9 Mr. Hare. *Id.* Ex. 18.

10 By letter dated April 9, 2010, the plaintiffs asked the AAA to  
 11 reconsider its appointment of Arbitrator Hare. *Id.* Ex. 19. The plaintiffs reiterated  
 12 their request for a new list of proposed arbitrators and "specifically ask[ed] that  
 13 Ms. LaMothe be included on the list as she was acceptable to both parties for the  
 14 Trump case . . ." *Id.* As an alternative proposition, the plaintiffs said they "would  
 15 accept Ms. LaMothe as the arbitrator in this MGM case." *Id.* She had been  
 16 previously denounced by the plaintiffs as the product of a "fraud and a sham." *Id.*  
 17 Ex. 4. Plaintiffs' motion (# 68) followed.

18 **III. ARGUMENT**

19 **A. The Court Has No Jurisdiction to Countermand the AAA's  
 20 Appointment of Brendan Hare.**

21 Where, as here, the parties agreed to arbitrate under the AAA rules  
 22 and the dispute involves a AAA procedural issue, court intervention is  
 23 inappropriate. *Howsam v. Reynolds*, 537 U.S. 79, 85 (2002) (questions of procedure  
 24 that grow out of a dispute "are presumptively *not* for the judge, but for an  
 25 arbitrator") (emphasis in the original); *Dockser v. Schwartzberg*, 433 F.3d 421, 423  
 26 (4th Cir. 2006) (holding that a dispute over the number of arbitrators to be  
 27 appointed is a procedural issue reserved for the arbitral forum — the AAA);  
 28 *Cohen v. Chase Bank, N.A.*, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 183542, \* 11 (D. N.J.

1 Jan. 20, 2010) (declining to entertain post-award argument that "the arbitration  
 2 was not conducted in accordance with the parties' agreement that a hearing take  
 3 place within the District of New Jersey by a New Jersey attorney").

4 Pre-arbitration challenges are only justified in rare instances, not  
 5 present here, where the arbitrator selection process itself is alleged to be  
 6 "fundamentally unfair." *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370,  
 7 385 (6th Cir. 2005). Such challenge requires more than speculation about an  
 8 arbitrator's unfitness or potential bias: Courts are not to presume that arbitration  
 9 forums such as the AAA are "unable or unwilling to retain competent,  
 10 conscientious and impartial arbitrators." *Gilmer v. Interstate/Johnson Lane Corp.*,  
 11 500 U.S. 20, 30 (1991). Instead, the plaintiffs are required to demonstrate that the  
 12 arbitrator selection process was so basically tainted that the arbitration forum is  
 13 not a proper substitute for a judicial forum. *Walker*, 400 F.3d at 385-86; *McMullen*  
 14 *v. Meijer, Inc.*, 355 F.3d 485, 493-94 (6th Cir. 2004). They entirely failed to do so  
 15 here.

16 **1. The AAA Arbitrator Selection Method is Fair.**

17 None of the cases on which the plaintiffs rely to support their  
 18 request for judicial relief is on point. In *Walker*, the court found the arbitrator  
 19 selection process fundamentally unfair based on a number of facts, including that:  
 20 (1) the defendant/employer had a contract with the arbitration forum, EDSI;  
 21 (2) EDSI was a "for-profit" organization; (3) EDSI received an annual fee from the  
 22 employer, which accounted for 42% of EDSI's gross income in 2002; and (4) the  
 23 "symbiotic relationship" with EDSI enabled the employer to effectively change the  
 24 forum's rules and determine the three selection pools of arbitrators, one of which  
 25 included only managers of employers that had an agreement with EDSI. 400 F.3d  
 26 at 386. Not one of these factors is present here.

27 In *McMullen*, the arbitrator selection process was unfair because the  
 28 employer had the unilateral right to select the pool of potential arbitrators, *and*

1 had consistently chosen the same five to seven potential arbitrators for each  
 2 arbitration taking place in Michigan. 355 F.3d at 493-94. In rejecting that selection  
 3 process, the *McMullen* court remarked that the employer "could easily have  
 4 adopted a procedure in which *an unbiased third-party, such as the AAA . . .* selected  
 5 the pool of potential arbitrators." *Id.* at 494 (emphasis added).<sup>5</sup> Turnberry/MGM  
 6 Grand Towers did not select the pool of arbitrators here, and it has not had prior  
 7 experience with any of them.

8         Here, the arbitration forum *is* the AAA, a not-for profit "unbiased  
 9 third-party." *McMullen*, 355 F.3d at 494. None of the defendants have contracts  
 10 with the AAA. The AAA — *not* the defendants — selects the pool of potential  
 11 arbitrators. The AAA maintains a roster of highly qualified and experienced class  
 12 action arbitrators. Levin Decl. Exs. 2, 10 (arbitrator resumes). The AAA rules  
 13 require that single arbitrators be selected from that list for cases filed as putative  
 14 class actions. *Id.* Ex. 1. There is nothing in the AAA rules that gives the  
 15 defendants an unfair advantage.

16         Unlike in *McMullen* and *Walker*, plaintiffs' suspicions of impropriety  
 17 have no factual basis. There is nothing "odd" about the fact that the AAA  
 18 included Michael Zimmerman — a colleague of the alleged drafter of the PSA in  
 19 another city at issue here — on the first arbitrator selection list. The AAA had yet  
 20 to receive the parties' conflict disclosure forms. Levin Decl. Ex. 2. A conflict  
 21 check would not have eliminated Mr. Zimmerman, because his law firm, Snell &  
 22 Wilmer, does not represent any of the respondents in this case. How could the  
 23 AAA have known that someone in Zimmerman's multi-state law firm may have  
 24 drafted the PSA?

25  
 26         

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 27         <sup>5</sup> *Thomas Kinkade Co v. Lighthouse Galleries, LLC* simply did not concern  
 28 whether the arbitrator was properly appointed, but whether the arbitrator's  
 subsequent misconduct during the arbitration proceeding justified vacatur. 2010  
 WL 436604 \* 5 (E.D. Mich. January 27, 2010).

1                   There is also no reasonable basis for plaintiffs' assumption that the  
 2 AAA "purposely" omitted four arbitrators who were on the first list — Barrett,  
 3 Jefferson, Jones, and LaMothe — from the second list. It is meaningless that these  
 4 four arbitrators passed the conflict check in the Trump arbitration in which Gerard  
 5 and Blumenthal are the claimants' counsel. The Trump arbitration involves  
 6 entirely different claimants and an entirely different respondent. If the AAA  
 7 omitted these four arbitrators from the second arbitrator selection list after  
 8 conducting the thorough conflict screening requested by the *plaintiffs*, it  
 9 necessarily follows that they *failed* the comprehensive conflict screening the  
 10 plaintiffs asked for.

11                   2.     ***Both Arbitrator Selection Lists Were Composed According to***  
 12                   ***the AAA Rules and the Parties' Agreement.***

13                   As a general rule, the AAA must send each party "an identical list of  
 14 10 [arbitrators]." AAA Commercial Arbitration Rule R-11 (a). It can deviate from  
 15 the rule if a "*different number is appropriate . . .*" *Id.* (emphasis added). "If the  
 16 parties fail to agree on any of the persons named . . . the AAA shall have the  
 17 power to make the appointment from among other members of the National  
 18 Roster *without the submission of additional lists.*" *Id.* R-11(b) (emphasis added). In  
 19 single arbitrator cases filed as putative class actions, the arbitrators are selected  
 20 "from the AAA's national roster of class arbitration arbitrators." Supplementary  
 21 Rules for Class Arbitrations, sections 1(a), 2(a).

22                   The AAA followed these rules on October 9, 2009, when it circulated a  
 23 list of ten prospective arbitrators from its national roster of class arbitration  
 24 arbitrators. Levin Decl. Ex. 2. The AAA also followed these rules and the parties'  
 25 agreement on January 29, 2010, when it circulated the second arbitrator list of eight  
 26 arbitrators. Levin Decl. Ex. 10. Like the first list, the second list was composed of  
 27 arbitrators from the AAA's national roster of class arbitration arbitrators. *Id.* All  
 28 eight arbitrators were pre-screened for conflicts, as agreed by the parties. None

1 had conflicts to report. *Id.* All arbitrators disclosed their resumes and provided  
 2 details about their expertise and experience as arbitrators and litigators. *Id.*

3 The AAA did not violate the parties' agreement to be provided with a  
 4 second list of ten, because there was *none*. Jonathan Weed's October 15, 2009,  
 5 email says nothing about an agreement for "a [second] *list of 10 arbitrators*," nor  
 6 that such list "*would include the original 9 arbitrators without conflicts . . .*" Motion at 8  
 7 (lines 3-5) (emphasis added). All the parties agreed to was to be provided with a  
 8 second list of arbitrators — now pre-screened for conflicts. Levin Decl. Ex. 5. That  
 9 second list could only include "the 9 original arbitrators without conflicts" if they  
 10 did not have any.

11 The fact that one arbitrator of the eight arbitrators, Ralph Halpern,  
 12 declined to disclose confidential case information did not reduce the list to "7," nor  
 13 did it change the parties' agreement, as the plaintiffs contend. Motion at 2, 5.  
 14 Mr. Halpern provided a detailed resume showing that he had ample experience  
 15 with "securities matters," just as the plaintiffs had requested. Levin Decl. Ex. 10.  
 16 The parties did not have an agreement that prospective arbitrators should  
 17 disclose case information in violation of their ethical obligations.

18       3.     *The AAA's Appointment of Brendan Hare Was Proper.*

19 Plaintiffs' argument that the AAA case manager "unilaterally" and  
 20 "secretly" selected Mr. Hare is frivolous. When appointing Mr. Hare, Mr. Weed  
 21 was simply following Rule R-11(b), which gives the AAA the power to appoint an  
 22 arbitrator in case the parties "are unable to agree upon an arbitrator." R-11(b)  
 23 (emphasis added). There was nothing "secret" about Mr. Hare's appointment.  
 24 During the February 5, 2010, telephone conference, Mr. Weed "openly" told  
 25 counsel that the AAA necessarily held back one pre-screened, conflict-free,  
 26 arbitrator in case the parties could not come to an agreement on any of the eight  
 27 proposed arbitrators. Levin Decl. ¶ 15. That arbitrator turned out to be Mr. Hare,  
 28 which was as much a surprise to MGM as it was to the plaintiffs.

1                   The parties had failed to agree on an arbitrator. Ignoring Mr. Weed's  
 2 advice "to leave as many names on the list" as possible and his warning that the  
 3 AAA would appoint an arbitrator "without the submission of an additional list,"  
 4 *id.* Ex. 10, the plaintiffs struck **six of the eight** proposed arbitrators. *Id.* Ex. 12. By  
 5 leaving only two arbitrators on the list, the chances of the parties agreeing on one  
 6 or both of these arbitrators were slim to none. The plaintiffs make too much of  
 7 Mr. Weed's alleged statement during an *ex parte* telephone conversation with  
 8 plaintiffs' counsel that Mr. Hare "was not immediately desirable . . . and was  
 9 intentionally held back in case there was no agreement." Blumenthal Decl. # 68-2,  
 10 ¶ 16.<sup>6</sup> What else should the AAA have done? Shame on the AAA and Mr. Weed  
 11 for including the most qualified and experienced arbitrators on the arbitrator  
 12 selection list, as plaintiffs requested.

13                   The plaintiffs only have themselves to blame for their gamble on  
 14 eliminating six arbitrators. They knew they could not strike the arbitrator  
 15 appointed by the AAA. R-11(b). By asking the AAA and now this Court to ignore  
 16 Rule R-11(b), and give them a *third* arbitrators list — or, alternatively, an arbitrator  
 17 they now find appealing, Levin Decl. Ex. 2, the only ones who are not playing by  
 18 the AAA rules and the parties' agreement are the *plaintiffs*.<sup>7</sup>

19  
 20  
 21                   <sup>6</sup> Norman Blumenthal admits that the telephone conversation was just  
 22 between Mr. Weed and himself. *Id.*

23                   <sup>7</sup> There is no merit to plaintiffs' unsupported argument that "there are now  
 24 five new parties to this arbitration as ordered by the Court." Motion at 9. The five  
 25 non-signatory defendants to which the plaintiffs presumably refer, are not "new  
 26 parties" that require a new conflict screening to justify a third list of ten arbitrators.  
 27 They were named in plaintiffs' initial August 31, 2009 arbitration demand and the  
 28 federal class action complaint it incorporated. Levin Decl. Ex. 20 (listing as  
 "respondents" MGM Mirage, Turnberry/MGM Grand Towers, LLC,  
 Turnberry/Harmon Ave., LLC; Turnberry West Realty, Inc.; MGM Grand  
 Condominiums, LLC, and The Signature condominiums, LLC). The demand and  
 the complaint it incorporated were sent to the prospective arbitrators to enable the  
 "complete conflicts' check" requested by the plaintiffs. *Id.* Ex. 8.

**4. Plaintiffs' Objection to Mr. Hare is Their Second Attempt to Avoid Their Arbitration Agreement.**

20 As soon as the AAA and the defendants agreed to plaintiffs' proposed  
21 comprehensive pre-screening for conflicts, the plaintiffs increased their demands  
22 for preferential treatment. They wanted to know how the AAA selected their class  
23 action arbitrators, how these arbitrators had decided class certifications, what  
24 judgments they had rendered, and what type of clients they represented —  
25 plaintiffs or corporate defendants. *Id.* Ex. 6. While expressing concern that the  
26 AAA could not provide a list of ten arbitrators based on their understanding that  
27 the AAA class action roster included "less than 36 [arbitrators]," *id.*, the plaintiffs  
28 rejected the sensible solution of Mr. Weed to "increase the pool of arbitrators" by

1 including arbitrators from outside the class action panel. *Id.* ¶ 11 and Ex. 7  
 2 thereto. They had already decided that the second list would be "inherently  
 3 prejudicial" to them. *Id.* Ex. 6. Accepting Mr. Weed's solution would deprive  
 4 them of that argument. Indeed, when the second, conflict-free, arbitrator selection  
 5 list arrived, composed of eight arbitrators selected solely from the AAA class  
 6 panel, the plaintiffs immediately called the reduced panel "inherently prejudicial  
 7 to consumers." *Id.* Ex. 11.

8 Plaintiffs' strikes from the last list further confirms their bad faith.  
 9 Although the list included two "retired judges" (Pratt and Dreier), an arbitrator  
 10 who had certified several classes in AAA arbitrations (Brewer), and three  
 11 arbitrators with extensive litigation and arbitrator experience in securities law  
 12 (Halpern, Longhofer, and Pratt) — corresponding *exactly* to plaintiffs' requests, *id.*  
 13 Exs. 2, 7 — the plaintiffs struck all five of them, in addition to Fleming. Ex. 12. In  
 14 striking 75% of the panel, they effectively ruined the likelihood of the parties  
 15 agreeing on the last two, and essentially gambled on an arbitrator they knew  
 16 nothing about.

17 Bad losers, the plaintiffs refused to accept responsibility. It was all the  
 18 AAA's fault. *Id.* Ex. 14. Upon learning that Mr. Hare was appointed, plaintiffs'  
 19 counsel assailed the AAA, ignoring the AAA rules ("Why was Mr. Hare left off the  
 20 original list?"), ignoring the qualifications of the proposed panel ("Why was our  
 21 request for a neutral with former experience as a US Attorney, Judge, or SEC  
 22 attorney ignored?"), and ignoring that he had *eliminated* most arbitrators with  
 23 these qualifications. *Id.* Ex. 12. Mr. Blumenthal's baseless demand to depose  
 24 Mr. Hare to determine if he is "in fact a neutral" is outrageously silly. So was his  
 25 threat that "[i]f we find that he has never ruled in favor of a consumer in a class  
 26 claim and *thus* is a *handpicked stooge* for MGM *we will sue AAA.*" *Id.* Ex. 14  
 27 (emphasis added); *see also id.* (threatening that he would seek to have AAA "cease  
 28 and desist acting as an *alleged* neutral arbitration company... *as a result of this fraud.*

1 . . ." and *seek discovery* to determine "if this tilt in favor of corporations in [sic] an  
2 ongoing practice of AAA and a fraud on consumer claimants") (emphasis added).

3 Plaintiffs' aberrational obstructionist behavior displays their bad faith  
4 and attempts at arbitrator shopping. Enough already. Plaintiffs' frivolous  
5 objections were properly dealt with and rejected by the AAA. *Id.* Exs. 16, 18.  
6 Plaintiffs have not provided any legal basis for a "second opinion" from this  
7 Court, nor do they deserve one. Plaintiffs' motion should be denied.

8 **IV. CONCLUSION**

9 For all the reasons stated above, the Court should deny the plaintiffs'  
10 motion.

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## CERTIFICATE OF SERVICE

2 Pursuant to Fed. R. Civ. P. 5(b) and Section IV of District of Nevada  
3 Electronic Filing Procedures, I certify that I am an employee of MORRIS  
4 PETERSON, and that the following documents were served via electronic service:  
5 **OPPOSITION TO MOTION FOR ORDER REQUIRING AAA TO SUSTAIN**  
6 **OBJECTION TO APPOINTMENT OF ARBITRATOR (#68)**

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By: